

OFFICE OF SPECIAL MASTERS

No. 90-3652V

(Filed: October 18, 1999)

JOSHUA LEE MESSER, by his mother
And next friend, ELIZABETH MESSER,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

TO BE PUBLISHED

Ronald Homer, Esq., Boston, Massachusetts, for Petitioner.

Linda Renzi, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DAMAGES DECISION

ABELL, Special Master:

On 1 October 1990, Petitioner filed a petition under the National Childhood Vaccine Injury Act of 1986

(Vaccine Act or Act)⁽¹⁾ for the alleged vaccine-related injury of Joshua Messer as a result of a 14 September 1984 diphtheria-pertussis-tetanus (DPT) vaccination. Respondent conceded that Petitioner was entitled to compensation under the Act. The parties have held copious discussions on the issue of Joshua's future, reasonable, compensable needs. On 24 September 1999, Respondent filed a life care plan with an attached summary chart of projected benefits and undisputed items. On 28 September 1999, Petitioners advised at the damages hearing that the parties had agreed to the compensation outlined in Respondent's summary charts attached hereto as Appendix A and B.

Form of Compensation Award

1. Lump Sum:

A lump sum payment for Compensation Year 1 in the amount of \$219,465.69 shall be payable to petitioner as soon as practicable after entry of judgment, as provided for in the Note on Appendix A.

2. Annuity:

Section 15(f)(4) requires that payment of compensation be based on the net present value of the elements of compensation. One way of discounting to net present value is to use the cost of an annuity to provide periodic payments to meet projected needs of a petitioner for the remainder of his life. Special masters are specifically empowered by § 15(f)(4) of the Act to order that the compensation awarded under the Program be used to purchase an annuity. A distinct advantage to the use of an annuity is that it protects the corpus of the award from mismanagement or other waste by the petitioner or his parent or guardian. The court considers it in Joshua Messer's best interests to order that the compensation be paid in the form of an annuity in this case, as provided for in Appendix A and Appendix B.

The annuity company must meet the following criteria:⁽²⁾

1) has a minimum of \$100,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and

2) has one of the following ratings from two of the following rating organizations:

a) A.M. Best Company: A+, A+g, A+p, A+r or A+s;

b) Moody's Investors Service Claims Paying Rating: Aa3, Aa2, Aa1 or Aaa;

c) Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+ or AAA;

d) Duff & Phelps Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+ or AAA.

3. Further Provisions to Safeguard Program Funds

a. Commencing with the first anniversary of the date of judgment, as long as Joshua remains in a home or otherwise under joint care with his twin brother Jared, the annuity company shall make payments to the court-appointed Guardian of Joshua's estate as set forth in Appendix A--Items of Compensation for Joshua Messer (Joint Care Alternative). Joshua will continue to receive payments set forth in Appendix A for the remainder of his life. During the period that Joshua and Jared are living together, additional unreimbursable expenses that would be incurred for Joshua under an individualized home-based program, as set forth in Appendix B--Items of Compensation for Joshua Messer (Individualized Care: Additional Expenses), shall be payable to the Vaccine Injury Compensation Program.

b. Commencing with the first anniversary of the date of judgment, if at any time Joshua is separated from his brother for a period exceeding one month, the Guardian shall notify the Vaccine Injury Compensation Program, Division of Fiscal Services, which office shall direct the annuity company to make payments set forth in Appendix B payable to Joshua's court-appointed guardian for the benefit of Joshua.

Payments arising from this change in circumstances shall commence with the payment expected to be made in the first month after notification, as long as such notification occurs 10 days prior to the

issuance of said payment.

c. If after living separately and receiving individualized care, Joshua should return to the same home with his brother or otherwise receive joint care with Jared, the court-appointed Guardian shall notify the Vaccine Injury Compensation Program, Division of Fiscal Services, which office shall direct the annuity company to cease making payments pursuant to sub-paragraph b. above and to commence making payments set forth in Appendix B payable to the Vaccine Injury Compensation Program, pursuant to sub-paragraph a. of this section.

Payments arising from this change in circumstances shall commence with the payment expected to be made in the first month after notification, as long as such notification occurs 10 days prior to the issuance of said payment.

4. Life Expectancy:

A finding on life expectancy is unnecessary because the annuity issuing company will take life expectancy into account when pricing the annuity.

5. Attorneys' Fees & Costs:

On 15 October 1999, Petitioner filed her petition for attorneys' fees and costs. Respondent advised that upon reviewing the fees and costs petition, she determined that Petitioner exceeded the statutory pre-act maximum, incurring in excess of \$30,000.00 in fees and costs. Respondent had no significant objections to the fees and cost petition which would have decreased Petitioner's fee petition below the statutory maximum. The Court also reviewed the entire record and the petition, and agrees with Respondent that the petition for fees and costs is reasonable. Therefore, Petitioner is awarded the statutory maximum of \$30,000.00.

CONCLUSION

Petitioner, in her capacity as Joshua Messer's legal representative, is entitled to an award under the Vaccine Program to provide for compensable expenses as stated in the attached Appendix A and Appendix B (under the conditions set for the Paragraph 3 above). In addition, Petitioner is entitled to an award of attorneys' fees and costs in the amount of \$30,000.00 made jointly payable to Petitioner and

Petitioner's counsel.

In the absence of a motion for review filed pursuant to RCFC, Appendix J, the clerk is directed to enter judgment according to this decision.

IT IS SO ORDERED.

Richard B. Abell Special Master

1. The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§ 300aa-1 *et seq.* (West 1991 & Supp. 1997). For convenience, further reference will be to the relevant subsection of 42 U.S.C.A. §300aa as so amended.
2. These criteria are taken from the December 1990 draft of the Uniform Periodic Payment of Judgments Act.